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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 25

Application Number: 09/241,508

Filing Date: February 01, 1999

Appellant(s): EVANS ET AL.

MAILED

FEB 04 2002

GROUP 1700

EXAMINER'S ANSWER

Michaele A. Hakamaki
For Appellant

This is in response to the appeal brief filed November 12, 2002.

(1) Real Party in Interest

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

The appellant's statement of the issues in the brief is substantially correct. The changes are as follows: the rejections relying upon Carollo have been dropped in order to simplify the issues on appeal.

(7) *Grouping of Claims*

The appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because appellant does not give reasons in the argument to support this statement.

(8) *ClaimsAppealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

5,687,638	MAKOWECKI	11-1997
4,534,726	SIMELUNAS	8-1985

RADEMAKER B.V., "MAKE UP LINES the versatile approach", January 1999, pp. 1-26.

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims:

Election/Restrictions

1. This application contains claims 75-77 drawn to an invention nonelected without traverse in Paper No. 4. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 71-74 are rejected under 35 U.S.C. 102(b) as being anticipated by Makowecki [Pat. No. 5,687,638].

Makowecki teaches a method of cutting a dough sheet by providing a sheet of dough with two surfaces (Figure 5, #26), a movable cutter with circular shapes (Figures 3 & 5, #30 & 38), pinching the dough surfaces together while shaping and cutting the dough sheet into separate pieces (Figure 5, #32), the cutter having blunt portions at an inner radial periphery (Figure 5, #41), cutting edges which are geometric figures at an outer radial periphery (Figure 5, #39; Figure 3), the inner and outer peripheries being different shapes when viewed from the side (Figure 5, #39 & 41), a conveyor (Figure 5, #28), and a steam cooker where the dough pieces would rise (Figure 2, #44).

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 60-64 and 68-69 are rejected under 35 U.S.C. 103(a) as being unpatentable over Makowecki.

Makowecki teaches a dough cutting device comprising a cutter with a rounded blunt inner portion (Figure 5, #41), a cutter edge in the form of a flat tip on the periphery (Figure 5, #39), a rotatable drum (Figure 5, #30), the blunt portion and cutter edge having different geometric shapes (Figure 5). It would have been obvious to one of ordinary skill in the art to vary the dimensions of the round blunt portion of Makowecki since Makowecki already includes a movable cutter with rounded surfaces (Figure 5, #30); since different sizes would have been used during the course of normal experimentation and optimization depending upon such factors as the type of product being made (for instance pierogies or ravioli), and since Makowecki teaches that the depth and width are carefully selected in order to provide an effective seal (column 3; lines 40-49).

In re Rose , 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" were held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); In re Rinehart, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). In Gardner v. TEC Systems, Inc., 725 F.2d 1338,

220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

6. Claim 70 is rejected under 35 U.S.C. 103(a) as being unpatentable over Makowecki as applied above, in view of RADEMAKER B.V. Makowecki teaches the above mentioned concepts. Makowecki does not teach a hexagonal shape enclosing a circular shape. RADEMAKER B.V. teaches a cutting roller with hexagonal shapes and circular shapes within other shapes (page 14). It would have been obvious to one of ordinary skill in the art to incorporate the shapes of RADEMAKER B.V. into the invention of Makowecki since both are directed to rollable dough cutters, since Makowecki already includes circular shapes (Figure 3, #38) and interlocking the shapes in order to reduce the amount of wasted food material (column 2, lines 48-56), since hexagons can interlock exactly without any waste between their edges, since the use of multiple shapes was commonly known as shown by RADEMAKER B.V. (page 14) and would have improved the appearance of the dough products and thus provided increased consumer appeal. MPEP 2144.04 further states: In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966) (The court held that the configuration of the claimed disposable plastic nursing container was a matter of choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular configuration of the claimed container was significant.).

7. Claims 65-66 are rejected under 35 U.S.C. 103(a) as being unpatentable over Makowecki as applied above, in view of Simelunas [Pat. No. 4,534,726]. Makowecki teaches the above mentioned concepts. Makowecki does not teach a walking head. Simelunas teaches a method of cutting dough by use of a reciprocally mounted, walking head (column 5, line 66 to column 6, line 21). It would have been obvious to one of ordinary skill in the art to incorporate the reciprocally mounted, walking head of Simelunas into the invention of Makowecki since both are directed methods of cutting dough with blunt cutters, since Makowecki already includes a conveyor belt and a movable cutter (Figure 5, #28 & 30), since both the roller cutter of Makowecki and the walking head cutter of Simelunas performed the same stamping and cutting function, and since the reciprocally mounted, walking head of Simelunas would press the blunt portion directly down into the dough (Figure 8) rather than entering at an angle as with the roller of Makowecki (Figure 5) and thus decrease the chance of damaging or misshaping the dough.

(11) Response to Argument

Appellant argues that there is no motivation to use the method of Makowecki for cutting a dough sheet. However, Makowecki clearly does cut a dough sheet with first and second surface skins (Figure 5, #26) since the filled food is made up of a base sheet of dough, a filling, and a top sheet of dough. The method of Makowecki provides the same function as appellant's method. It shapes and severs a dough sheet, and then continues to shape and sever the filling and other dough sheet as well. Makowecki

clearly illustrates partitioning the food into separate pieces by use of a stamping motion which pinches, shapes, and severs the food into separate pieces (Figure 5, #32).

Furthermore, if the dough sheets of Makowecki were not effectively pinched, the filling material would have leaked from the finished product.

Appellant argues that sealing lips (Figure 5, #41) cannot sever the dough.

However, the Office has not relied upon the sealing lips to teach severing the dough.

Furthermore, attention is drawn to appellant's Figure 8B which has an identical profile to that of Makowecki.

Appellant argues that Makowecki does not teach different geometries at an inner and outer periphery and with the inner periphery having a blunt portion, and the outer periphery having a cutting edge. However, Makowecki clearly illustrates these features in Figure 5 (#39, 41) where the blunt portion and cutting edge have different geometries when viewed from the perspective of Figure 5, where the cutting edge is located at an outer radial periphery as viewed in Figure 5 (#39), and the blunt portion is located at an inner radial periphery as viewed in Figure 5 (#41).

Appellant argues that Makowecki does not teach a cutter which both shapes and

severs. However, Figure 5 of Makowecki clearly illustrates a rotary stamper which pinches, shapes, and severs the dough sheet into separate pieces (#30, 32, 39, 41).

Furthermore, the profile of the cutter used by Makowecki (Figure 5, #39 & 41) is identical to the cutter of appellant as shown in Figure 8B.

With regard to claims 65-66, appellant argues that Simelunas does not teach a dough shaping surface. However, Simelunas clearly illustrates a dough shaping surface (Figure 8, #3).

With regard to claim 70, appellant argues that Rademaker B.V. does not teach an inner periphery dough shaping portion and an outer periphery cutter. However, the secondary reference of Rademaker B.V. is relied upon to teach the general principle of dough rollers with cutting dies of various shapes (page 14). Further, the primary reference of Makowecki clearly teaches these peripheral features as explained above.

In conclusion, Makowecki includes the same cutting and shaping means as appellant. The profile of Makowecki (Figure 5, #39 & 41) is identical to that of appellant's Figure 8B. Furthermore, in order for the device of Makowecki to shape and sever the filled dough product, it must also shape and sever at least one sheet of dough.

Art Unit: 1761

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Drew E Becker
Examiner
Art Unit 1761


Drew Becker
January 27, 2003

Conferees
Keith Hendricks
Glenn Caldarola

MARK W. BINDER
KAGAN BINDER, PLLC
221 MAIN STREET NO.
SUITE 200
STILLWATER, MN 55082-5021


KEITH HENDRICKS
PRIMARY EXAMINER


Glenn Caldarola
Supervisory Patent Examiner
Technology Center 1700